Annex 14

Summaries of Selected Cases Concluded by Full Investigation

(Where applicable, the specific aspect of maladministration established is highlighted for clearer focus at the end of the case summary)

Hong Kong Examinations and Assessment Authority ("HKEAA")

Case No. OMB 2008/2001

Marking scheme – changing the marking scheme for a paper in a public examination – substantiated other than alleged

The Complaint

In April/May 2008, this Office received a complaint from nearly 100 students sitting for the 2008 Hong Kong Advanced Level Examination ("HKALE"). They criticised HKEAA for unreasonably and unfairly changing the marking scheme for a Use of English paper, to accommodate candidates who had not followed the instructions in the paper.

Setting of Examination Questions and Marking Schemes

2. HKALE questions are set by the HKEAA Moderation Committee, while marking schemes are devised by the Committee as guidelines for markers.

3. For each subject, HKEAA has a panel of markers. After each examination, the panel will scrutinise a sample of about 1% of examination scripts to analyse candidates' performance. The object is to establish a unified marking standard for the subject. Where necessary, the panel will revise the marking scheme.

The Paper in Question

4. In the paper in question, candidates were asked to listen to a recorded conversation about items which players in a game were allowed to bring to a deserted island and those items they were not allowed to have. Candidates were required to answer the question:

"What the players are allowed to have: Put ticks or crosses …."

Original Marking Scheme

5. According to HKEAA's intention and the original marking scheme, candidates were expected to put in the boxes a "✓" for items "allowed to have" and a "✗" for those "not allowed to have". Marks would be given for correct answers, while wrong answers would neither score nor lose marks.

Revised Marking Scheme

6. After the examination, the panel of markers first marked about 600 examination scripts in accordance with the established procedures. Candidates' answers came out as follows:

- most candidates had marked all the boxes with "✓" and "✗" (Category One candidates);

- a small number of candidates had put "✓" and "✗" in some boxes and left the rest blank (Category Two candidates);
- yet others had put "✓" in some boxes and left the rest blank (Category Three candidates).

The panel inferred the following "intended answers" from these three categories of candidates:

Category One candidates

"✓" indicated items that were "allowed to have";
"✗" indicated those "not allowed to have".

Category Two candidates

"✓" indicated items that were "allowed to have";
"✗" indicated those "not allowed to have";
boxes left blank meant unattempted question.

Category Three candidates

"✓" indicated items that were "allowed to have";
the blank boxes indicated those "not allowed to have".

Marked according to "Intended Answers"

7. After discussion, the markers decided to revise the marking scheme so that the scripts would be marked on the basis of the "intended answers" of each category of candidates.

8. HKEAA argued that marking schemes should be based on the assessment objectives and revised according to the "intended answers" of candidates. The Authority considered it an important "professional principle" to mark scripts in the light of candidates' "intended answers" when such "intended answers" were evident. This should not be regarded as unfair.

Our Observations and Comments

9. HKEAA originally intended that candidates should answer the question by using "✓" to indicate items that were allowed to have and "✗" to indicate those that were not allowed. However, the instructions literally conveyed a completely different message. The instructions specifically asked candidates to use **either** "✓" **or** "✗" to indicate "allowed to have".

10. Moreover, there was no guidance as to how to indicate items that were "not allowed to have". Thus, a blank box could be taken to mean either an item "not allowed to have" or an unanswered question.

11. The instructions had not only failed to reflect HKEAA's original intention, but also to provide clear guidelines for candidates. Consequently, with candidates using different approaches to answer

the question, HKEAA could only resort to using discretion based on a general understanding and customary usage of the signs “✓” and “✗” to infer candidates’ “intended answers” and mark their scripts accordingly.

12. We understand that in marking scripts according to the “intended answers” instead of adhering to the instructions given, HKEAA’s aim was not to make candidates lose marks. Regrettably, however, this had the undesirable outcome of the Authority encouraging candidates to disregard specific instructions in examination questions.

Conclusion

13. The complainants were actually accusing HKEAA of awarding marks to the Category Three candidates, whom the complainants thought had not followed the instructions in the paper. The complainants were wrong. It was the complainants themselves who had adhered to the convention of “✓” and “✗” representing “yes” and “no” and disregarded the specific instructions. These, strictly speaking, had been followed only by the Category Three candidates.

14. The complaint itself was, therefore, unsubstantiated. However, in this case, HKEAA had clearly failed in its duty to provide candidates with appropriate and accurate task instructions. As a result, candidates were confused. Hence, The Ombudsman considered the case substantiated other than alleged.

15. This case revealed that HKEAA’s system, though fairly elaborate, had failed to prevent an obvious mistake in question setting. The Ombudsman saw this as a serious deficiency in the system and urged the Authority for review.

16. In this light, The Ombudsman also decided to initiate a follow-up direct investigation for a more in-depth examination into HKEAA’s mechanism of setting questions, with a view to identifying further room for improvement.

A case of carelessness and inadequate checking

Hong Kong Housing Authority (“HKHA”) and Housing Department (“HD”)

Case Nos. OMB 2007/4667-4668

Responsibility for repairs – refusing to carry out repairs to a Tenants Purchase Scheme estate – substantiated other than alleged

The Complaint

The Owners' Corporation ("OC") of a Tenants Purchase Scheme ("TPS") estate lodged a complaint with this Office against HKHA, the developer, and its executive arm HD for refusing to carry out repairs to the estate.

2. HKHA had given the estate a seven-year Structural Safety Guarantee. Before the Guarantee expired, the OC reported to HD spalling of concrete and exposure of steel reinforcement at windows and planters on the external walls and asked for repairs. However, HD refused as the defects were outside the scope of the Guarantee.

3. As HD had carried out similar repairs to other TPS estates out of "goodwill", the OC considered HKHA and HD unfair.

Response from HD

4. HD pointed out that as the windows and planters were all non-structural, they were outside the scope of the Guarantee and the OC should be responsible for their maintenance. Despite HD's repeated explanation, the OC was adamant that HD should carry out the repairs.

5. Upon our commencement of inquiries, however, HD reconsidered the case. Finally, it decided to exercise discretion and conducted the repairs on a one-off basis.

Our Observations and Comments

6. The defects reported were indeed outside the scope of HKHA's guarantee. HD's initial refusal of repairs was, therefore, appropriate and the OC's complaint unsubstantiated.

7. However, HD eventually abused its discretionary power and "goodwill" by reversing its decision. It simply should not have carried out repairs to the estate, essentially a private property, with public funds. If public safety had been a concern, the Buildings Department, rather than HD, would have been the proper authority to take action, the cost of which to be borne by the OC.

8. In this light, The Ombudsman considered this case substantiated other than alleged.

Recommendation

9. HD accepted our recommendation to tighten its use of discretion to avoid misuse of public funds.

A case of abuse of discretionary power

Annex 14

Summaries of Selected Cases Concluded by Full Investigation

Hong Kong Housing Society ("HKHS")

Case No. OMB 2008/1681

Unauthorised structures – installing unauthorised signboards on an external wall of a housing estate and refusing to remove them – substantiated

The Complaint

The Owners' Corporation ("OC") of an HKHS housing estate alleged that HKHS had illegally installed advertising signboards on an external wall of the podium. Despite repeated demands from the OC since early 2006 for removal of the signboards, HKHS started to demolish them only at the end of the following year.

The Event

2. HKHS owned the wall in question. In 2000, it installed signboards on the wall for advertising by its commercial tenants.

3. In April 2006, the Buildings Department ("BD") advised the OC that all the signboards were unauthorised structures and should be removed. In December 2006, the OC's legal representative, therefore, wrote to HKHS to demand removal of the signboards. However, HKHS maintained that it had full rights to use the wall in question. Eventually, HKHS removed the signboards in November 2007, but just to prepare for the installation of more advertising signboards later.

Our Observations and Comments

4. As a statutory public body, HKHS should have set a good example by not installing or tolerating the installation of any unauthorised structures. We were extremely surprised that it had contravened the law and installed the signboards without BD's prior approval.

5. Despite BD's advice, HKHS showed no regret over installing the unauthorised signboards and had no intention whatsoever to rectify its mistake.

6. The Ombudsman, therefore, considered this complaint substantiated.

7. HKHS undertook to seek BD's approval in future before installing similar signboards.

A case of defiance of the law

Hospital Authority ("HA")

Case No. OMB 2008/0005
Patients transfer service – improper arrangements of Non-Emergency Ambulance Transfer Service keeping the patient waiting for long – substantiated

Significant Delays

The complainant's mother was a paraplegic living in a care home for elderly persons. She had to visit a public hospital from time to time for follow-up consultation. One day, the complainant requested HA's Non-Emergency Ambulance Transfer Service ("NEATS") to pick up her mother for her medical appointment and return to the elderly home afterwards. However, they were kept waiting for long because the transfer vehicles arrived at the pick-up point more than 1.5 hours late on both trips. The complainant alleged that there had been similar delays a dozen times before. NEATS arrangements were inefficient and service was poor.

Route Planning

2. The NEATS Control Centre, when arranging for transfer service, would consider such factors as the vehicles available and the requests for the service on a particular day. Patients along the same route would, where possible, be arranged to ride on the same vehicle and transferred in a batch. Nonetheless, as there is no telling what might happen *en route*, the vehicles might not arrive on time. Once returned to the hospital, a vehicle would stay for about 30 minutes to allow crew members to clean the compartment, replenish supplies and take a rest before setting off for another assignment.

Causes for Delay

3. Transfer vehicles are manned by two- or three-man teams. As the complainant's mother had to be carried up and down the stairs, a three-man team was necessary. HA explained that the vehicle in question had other appointments that morning. On return to the hospital, the team members had to clean the compartment and have lunch before setting out to pick up the complainant's mother. The return trip also experienced delay as the journey was long and the vehicle held up by traffic congestion. The Control Centre was unable to deploy another vehicle with a three-man team to relieve them. Consequently, the transfer vehicle arrived some 1.5 hours late.

Service-Oriented Principle Foregone?

4. Traffic conditions and other factors would, of course, affect the arrival of a transfer vehicle. Nevertheless, NEATS clients are mainly physically weak or impaired. To keep them waiting for long showed a lack of consideration for them and ran counter to the service-oriented principle.

5. Records indicated that before picking up the complainant's mother at noon that day, the team members of the transfer vehicle had spent more than 1.5 hours cleaning the compartment and taking their meals. When they set out again, it was past the appointed time. The situation was similar that afternoon. The team members were well aware that they could not make it on time, but they never alerted the complainant in advance. Nor did they try to be more flexible with their rest or meal time. Such arrangements were indeed unsatisfactory.

6. The Ombudsman considered this complaint substantiated.

Improvement Needed

7. We recommended that HA review and draw up proper NEATS guidelines, including alerting the patient when it becomes clear that a transfer vehicle would be late for more than 15 minutes. It should also assess the time needed for rest and replenishing supplies.

8. HA accepted our recommendations and developed new measures for greater flexibility in route scheduling. To improve the service, it was also studying the feasibility of using the global positioning system for better estimation of arrival time.

A case of lack of consideration for service users

Housing Department ("HD")

Case No. OMB 2007/0310

Public housing rent deposit – refusing to refund rent deposit – partially substantiated

The Complaint

The complainants were the parents of a public housing tenant found dead in his unit in October 2006. The complainants requested HD to postpone its recovery of the unit to allow more time for Police investigation. In November, the complainants surrendered the unit. In December, they wrote to HD for refund of the rent deposit that their son had paid.

2. The property management agent ("PMA") of the housing estate rejected their request as the deposit had already been used to offset the rent for the period of their retention of the unit. The complainants, therefore, complained to this Office.

HD Explanation

3. Normally, HD allows flexibility when dealing with recovery of a unit after the tenant has passed away. The Department accepts

late surrender of such housing units so that the tenant's family has time to remove the tenant's belongings. Legally, a tenancy does not automatically end with the death of the tenant.

4. In this case, the complainants insisted on keeping the unit until the Police could ascertain the cause of their son's death. The PMA accepted their request because the complainants were emotional. It had, nevertheless, "verbally" informed them that they would have to pay rent while keeping the unit.

5. Although the Police confirmed at the end of October that there was no need to keep the unit for investigation, the complainants asked HD in early November for a further extension of 15 to 30 days. Some two weeks later, the complainants handed over their keys without clearing out the unit. The PMA called the complainants several times to ascertain their intentions, but in vain. Finally, the PMA formally recovered the unit. With HD's agreement, the PMA used the deposit paid by the late tenant to offset the rent for November.

Our Observations and Comments

6. This Office agrees that the tenancy could not be terminated until the complainants had formally surrendered the unit. It was, therefore, not unreasonable of HD to use the deposit to offset the outstanding rent. However, since the complainants were not party to the tenancy agreement, HD or the PMA should have explained to them clearly that rent was payable for keeping the unit.

7. However, the PMA had only reminded the complainants "verbally" of this. The lack of a written agreement had then led to disputes. We consider such handling slipshod.

8. This complaint was, therefore, partially substantiated.

9. We understand that the complainants were in grief and it was not easy for HD to recover the unit. However, since the Police had made it clear that keeping the unit was no longer necessary, HD should have taken recovery action earlier, so that the unit could be allocated to a wait-listed applicant.

Recommendations

10. The Ombudsman recommended that HD:

(a) arrange appropriate training for staff and PMAs; and

(b) refine its guidelines for handling requests by families of deceased tenants to defer surrender of public housing units.

A case of poor handling and delay

Annex 14

Summaries of Selected Cases Concluded by Full Investigation

Housing Department ("HD")

Case No. OMB 2007/4948

Rates refund – failing to refund rates to the complainant in line with Government's rates concession – substantiated other than alleged

The Complaint

The complainant lived in a public rental housing ("PRH") unit. He received a monthly rent allowance under the Social Welfare Department ("SWD")'s Comprehensive Social Security Assistance ("CSSA") Scheme. Since his rent allowance could not cover the rent in full, he had to pay the difference of some $100 each month.

2. In 2007, Government decided to waive the rates for April to September for the whole territory. When the complainant moved out at the end of August 2007, he argued that as he had paid part of the rent, HD should refund him part of the rates for the PRH unit.

3. He complained to this Office against HD for refusing to make such a refund.

Rates Refund Arrangement

4. For a CSSA household whose rent allowance equalled the monthly rent of the PRH unit, HD would transfer the full amount of rates concession to SWD. Where the CSSA recipient had to pay part of the rent, he was, theoretically, entitled to a rates refund on a *pro rata* basis. In practice, however, HD would first refund the rates in full to the CSSA recipient and SWD would later deduct any excess from his CSSA.

The Complainant's Case

5. In this case, the complainant had in fact refused to move out of the PRH unit after his divorce in December 2005. Hence, he was no longer an authorised resident of the unit. HD had sent him a letter notifying him so and demanded payment of "mesne profits" for illegal occupation of the unit.

6. Not being an authorised resident of a PRH unit, the complainant was actually not entitled to any rates refund. However, HD later, on review, found that it had wrongly used the term "use and occupation charges" (instead of "mesne profits") in its letter to the complainant, such that the latter might have misunderstood that he was licensed to stay in the PRH unit and was thus eligible for rates refund. In the event, the Department exercised discretion and refunded him part of the rates for the period concerned.

Our Observations and Conclusion

7. We considered it reasonable of HD not to make any rates refund to the complainant since he was not an authorised PRH resident. His complaint was, therefore, unsubstantiated.

8. However, HD's subsequent change of mind did not have good grounds. The misused terminology in HD's letter did not warrant anything more than clarification of the matter and an apology to the complainant. There was absolutely no need to refund him part of the rates. The Ombudsman, therefore, considered this case substantiated other than alleged.

Recommendations

9. The Ombudsman recommended that HD remind staff to:

(a) always use correct terminology when demanding payment from occupants of PRH units; and

(b) rectify mistakes as quickly as possible, instead of rationalising them.

A case of careless writing and wrong decision

Housing Department ("HD")

Case No. OMB 2007/4958

Footbridge management – failure to alert purchasers of a Home Ownership Scheme estate to their responsibility of managing and maintaining a footbridge – unsubstantiated

The Complaint

The Owners' Corporation ("OC") of a Home Ownership Scheme ("HOS") estate alleged that HD had failed to inform purchasers that they had to manage and maintain a footbridge. The OC considered it unfair to be asked to shoulder the burden, as the footbridge was used mainly by residents of Estate A nearby.

Background

2. According to the land lease and Deed of Mutual Covenant ("DMC") of the HOS estate, the estate should be responsible for managing and maintaining the footbridge. Nevertheless, as the footbridge was used mainly by residents of Estate A (then a public rental housing estate), HD in its dual role as DMC manager of the HOS estate and manager of Estate A initially assumed the responsibility.

3. 15 years after the completion of the HOS estate, HD secured the agreement of the OC and residents of Estate A (about to turn a Tenants Purchase Scheme estate) to share the costs of maintaining the footbridge. They subsequently signed a Deed of Cost Sharing to the effect that, besides sharing such costs, the OC was also to be responsible for management of the footbridge.

4. Two years later, HD informed the OC that it would cease managing the footbridge for the OC. However, the OC refused to take over the responsibility.

5. The dispute continued. In another three years, the insurer for the footbridge declared the insurance policy void for lack of proper management and regular maintenance. The OC decided to close the footbridge.

6. Even though HD offered to resume managing the footbridge for six months and to continue the dialogue with the OC and Estate A, the OC insisted on closing the footbridge until a management mechanism could be established.

Response from HD

7. HD explained that when the HOS estate was put on sale, there were no guidelines governing what information should be provided in the sales brochure. However, the land lease and the DMC did stipulate the estate's responsibility for managing and maintaining the footbridge. The Terms and Conditions for the Sale and Purchase of Flats given by HD to the purchasers when the sales agreements were signed also reminded purchasers that the flats were sold under the terms of the land lease and that owners would be bound by the DMC.

Our Observations and Comments

8. It is not uncommon in Hong Kong to stipulate in the land lease the responsibility of the lessee to manage and maintain neighbouring public facilities. It is also a normal practice to state such responsibility in the DMC.

9. When the HOS estate was put on sale decades ago, there were indeed no policy or guidelines to regulate the disclosure of information in sales brochures. It was not until 1995 that the Law Reform Commission suggested that developers highlight salient points of DMCs in sales brochures.

10. The estate's responsibility to manage and maintain the footbridge was clearly stated in the land lease, the DMC and, more recently, in the Deed of Cost Sharing, which the OC had signed with full awareness. There was no unfairness in HD asking the OC to discharge its responsibility.

11. The Ombudsman, therefore, considered this complaint unsubstantiated.

Housing Department ("HD")

Case No. OMB 2008/2251
Tenants' divorce – rejecting the complainant's application for adding his new-born son to his tenancy – partially substantiated

Divorced but Household Splitting Pending

The complainant lived in a public rental housing unit with his wife ("Ms A") and two sons.

2. He later divorced Ms A. While their grown-up elder son chose to stay with the complainant, the Court granted custody of their younger son ("the second son") to Ms A. The complainant then applied to HD for household splitting with Ms A in the hope that they would each be allocated a unit. HD initially accepted his application. Meanwhile, the foursome continued to live in the existing unit.

3. Subsequently, the complainant remarried and had a son ("the third son"). As his new wife was not yet a Hong Kong resident, she was not eligible for addition to his tenancy. He applied for adding the third son to his tenancy and requested to keep the existing unit. However, HD rejected his application on the grounds that Ms A had refused to move out. The complainant considered HD's decision unfair.

Application Frozen

4. According to HD policy, the complainant's third son was eligible for addition to his tenancy. This eligibility should not have been affected by Ms A's refusal to leave.

5. However, when the complainant filed his application for adding his third son to his tenancy, he was actually asking for permission for the new household member to live in the existing unit. Since he was at the same time seeking household splitting, we could understand HD's suspension of action on his application until he could reach agreement with Ms A on the tenancy of the existing unit.

Delay Unreasonable

6. Nevertheless, after months, both the complainant and Ms A still refused to move out of the unit. We consider that in the circumstances, HD ought to have contemplated terminating the tenancy of the existing unit and allocating separate units to the divorcees, thereby resolving the stalemate. HD's prolonged inaction pending their unlikely reconciliation was unreasonable.

Conclusion

7. In this light, The Ombudsman considered the complaint partially substantiated.

Recommendation

8. The Ombudsman urged HD to draw up guidelines and provide training for its staff on how to deal with cases of this nature.

A case of poor handling and delay

Immigration Department ("Imm D")

Case No. OMB 2008/3397

Identity card number – issuing the same identity card number to two persons – substantiated

The Complaint

The complainant alleged that Imm D had mistakenly issued the same identity card number to him and another person.

The Event

2. When the complainant was born in 1987, Imm D assigned "Z" as the prefix for his birth certificate number.

3. A few years later, the complainant's mother applied for him a Hong Kong Special Administrative Region Passport. He was required by law to apply simultaneously for an identity card for minors under the age of 11. According to Imm D practice, his identity card number should be the same as that for his birth certificate. However, the officer concerned mistakenly entered the prefix "Y" instead of "Z" in his identity card.

4. When the complainant reached the age of 11, he applied for a juvenile identity card. This time, another officer failed to check his birth certificate carefully, thus continuing the error. When the complainant eventually applied for an adult identity card, he was required to produce only his juvenile identity card, and not his birth certificate, for verification. The discrepancy between his identity card number and his birth certificate number, therefore, again went unnoticed.

5. In 2008, the complainant's application for a Home Visit Permit at the China Travel Service ("CTS") was rejected because his identity card number was the same as that of a child already on CTS records. Upon the complainant's query, Imm D searched its records and discovered the

error. It had indeed allocated the same identity card number prefixed "Y" to the aforementioned child.

Staff Negligence

6. The mistake was clearly due to the negligence of Imm D staff. In particular, issue of birth certificates with the prefix "Y" only began in 1989. Hence, when the complainant applied for his juvenile identity card at the age of 11 in 1998, Imm D staff should have focussed and detected the anomaly.

7. The Ombudsman, therefore, considered this complaint substantiated.

Redress

8. Imm D apologised to the complainant and issued to him a new identity card with the correct prefix "Z".

Our Recommendations

9. Nevertheless, The Ombudsman urged Imm D to:

(a) enhance staff training in processing applications for identity documents;

(b) check all identity card numbers on its records for any similar cases; and

(c) duly compensate the complainant for any costs incurred in replacing or amending his other personal documents.

A case of staff negligence

Lands Department ("Lands D")

Case No. OMB 2007/2180
Drainage problem – failing to cope with a problem of frequent flooding related to a Short Term Tenancy ("STT") – substantiated

The Complaint

The complainant had complained to Lands D about frequent flooding on a street during the rainy season. The Department allegedly promised to look into the matter, but the problem persisted.

Lease Conditions

2. The flooding was caused by a car park on Government land at one side of the street. One of the standard conditions of the STT required the car park operator as lessee to provide drainage channels, but the District Lands Office ("DLO") under Lands D had failed to enforce that condition.

Lands D's Defence

3. Lands D argued that there had never been any report of flooding in the area before the site was put out to tender. At the District Lands Conference on the proposed tenancy, none of the representatives from other departments suggested that the lessee be required to provide drainage channels. As a result, although that was a standard condition of all STTs, such requirement had not been made a special condition of the STT in question. It would, therefore, be illogical to assume tenderers to have included the cost of constructing drainage channels in their bids. Accordingly, Lands D did not consider it appropriate to take action against the car park operator for failure to provide drainage channels.

4. In the event, at DLO's request, the Drainage Services Department carried out overall improvement to the drainage of the street.

Our Observations and Comments

5. Lands D's argument was puzzling and flimsy.

6. The standard and special conditions of a STT should both carry force and the parties signing the STT should comply. The standard conditions were actually attached to the tender notice for the STT in question. All tenderers should, therefore, be aware of the lessee's obligation to construct drainage channels. Clearly, DLO had the responsibility to enforce that lease condition. Even if DLO wished to waive this requirement for the car park operator, it should have sought proper authority for it, instead of exempting the car park operator on the lame excuse that such a requirement was not stated in the special conditions of the STT.

7. What DLO had done would simply encourage lessees to ignore lease conditions.

8. In light of the above, The Ombudsman considered this complaint substantiated.

Recommendations

9. The Ombudsman recommended that:

(a) Lands D be more prudent when drawing up the conditions of Government land leases;

(b) DLOs should step up inspections and strictly enforce lease conditions; and

(c) where any obligation of a lessee was to be waived, proper authority should be sought beforehand.

10. Lands D generally accepted these recommendations.

A case of faulty procedures and abdication of responsibility

Lands Department ("Lands D")

Case No. OMB 2007/2632

Lands D – land control – failing to curb the illegal widening of a footpath – substantiated

The Complaint

A footpath flanking a park had been illegally widened to become a thoroughfare for heavy vehicles, thus affecting pedestrian safety. The complainant had complained to the District Lands Office ("DLO") under Lands D, but DLO had not taken effective enforcement action.

Question of Responsibility

2. The park was managed by the local rural committee ("RC") as licensee of the site. The local District Council had funded the installation of some facilities there, with maintenance by the District Office ("DO") under the Home Affairs Department.

3. Upon receiving the complaint, DLO first asked DO to take appropriate action, as DO had constructed a water channel along the footpath. DO replied that it was only responsible for maintaining the channel and DLO should deal with the complaint as a land control issue. DLO then asked RC to reinstate the footpath, but received no reply.

DLO Action Thwarted

4. At the request of a village representative, DLO decided to install an emergency crash gate at the entrance of the footpath to prevent vehicles from entering. However, the works encountered strong opposition from some villagers and had to be suspended.

Proposal for Regularisation

5. DLO then considered some residents' request for regularising the use of the widened footpath as a driveway. DO, however, pointed out

that some other residents opposed the proposal and suggested that DLO liaise with them to seek a consensus first.

6. DLO again asked RC to reinstate the footpath, but the latter only undertook to carry out some landscaping works.

Our Comments

7. Having clarified that DO was not responsible for maintaining the footpath, DLO should have pressed RC as licensee of the site to reinstate the footpath. DLO's procrastination had given people an impression of tacitly allowing the illegal widening of the footpath.

8. By failing to take prompt land control action, DLO had landed itself in a dilemma, caught between residents supporting and those opposing regularisation.

Conclusion

9. The Ombudsman, therefore, considered this complaint substantiated.

Recommendation

10. The Ombudsman recommended that Lands D immediately make it clear to the regularisation proponents that rather than trying to make the widening of the footpath a *fait accompli*, they must first file a formal application for consideration by the departments concerned.

A case of delay and lack of firm action

Leisure and Cultural Services Department ("LCSD") and Lands Department ("Lands D")

Case Nos. OMB 2006/4311; OMB 2007/2501

LCSD – park management – failing to resolve the problem of management and maintenance responsibility for a park, thereby wasting public resources – partially substantiated

Lands D – same – same – substantiated

The Complaint

The complainant alleged that the park near a private estate had been closed for many years and the public could not access the facilities there. She considered this a waste of public resources owing to the failure of LCSD and Lands D to resolve the problem of management and maintenance responsibility for the park.

Background

2. In March 1997, Lands D and the estate developer signed a new grant in which the special conditions required the developer to provide at its cost public facilities in the local open space where the park was located. The developer should ensure that the facilities met the requirements of the Director of Lands. Moreover, the developer was to be responsible for managing and maintaining the site and bear all the expenses.

3. In November 2000, having consulted the relevant departments, Lands D issued a Certificate of Compliance to confirm the developer's compliance with all the conditions of the new grant. In December, the owners' committee and property management company of the estate asked Government to take over the park.

4. LCSD refused to do so while Lands D pointed out that the special conditions of the new grant stipulated that Government authorities had no obligation to take back the local open space or any part thereof. As the owners of the estate were unwilling to continue with the responsibility to manage and maintain the park, the management company decided to close it.

Response from LCSD

5. Through Lands D, LCSD had repeatedly reminded the committee and management company to comply with the special conditions and advised them to improve the substandard playground equipment. However, they made no positive response. LCSD held that Government should not waive the responsibility of the developer or property owners just because they refused to comply with the lease conditions.

Response from Lands D

6. At the committee's request, Lands D consulted the Town Planning Board ("TPB") in December 2007. TPB replied that even if the playground equipment was removed, the planning requirement would not be contravened so long as the site remained a local open space available to Government and the public at all reasonable times.

7. The committee finally agreed to reopen the park, but would fence off the playground equipment temporarily until a consensus on a long-term arrangement could be reached among the property owners.

Our Observations and Comments

8. We agreed with LCSD that Government should not unconditionally waive the responsibility of the private developer or property owners and use public money to manage those recreational facilities. However, LCSD could have given timely comment on the safety standard of the facilities. It was not until November 2002 when LCSD was considering taking over the park that it found the facilities substandard.

9. Lands D had been tolerant towards the developer and property owners and adopted a conceding attitude. Without such a complaint, the problem would have remained unresolved.

Conclusion and Recommendations

10. This Office was aware that LCSD wanted to be fair and reasonable and did not wish to take over the park too hastily. However, had LCSD managed to explain clearly at the right time, the public would not have gained the wrong impression that Government was slipshod.

11. Lands D emphasised that re-entry on leased land was a very drastic measure that should not be taken lightly. However, we did not think that it could evade the issue. Suspension of enforcement action was not justifiable even though due regard had to be given to the sentiments and expectations of the residents.

12. The Ombudsman considered the complaint against LCSD partially substantiated and that against Lands D substantiated.

13. This Office was pleased that the Development Bureau had begun a comprehensive review of its policy on the provision of public facilities and open space in private developments. It is hoped that similar situations could be avoided in future. Meanwhile, The Ombudsman made the following recommendations to LCSD and Lands D:

For LCSD

(a) review the provision of playground equipment in the area quickly. More facilities should be provided in case of inadequacy;

For Lands D

(b) step up inspections at the park to ensure that the facilities are safe. Irregularities found must be subject to prompt and resolute lease enforcement action;

(c) search past records for similar cases to come up with a solution; and

(d) discuss with the relevant policy bureau and other departments and organisations immediately so as to prevent recurrence of similar problems.

A case of delay and failure to follow procedures

Rating and Valuation Department ("RVD") and Housing Department ("HD")

Case Nos. OMB 2008/2677-2678
RVD – rates assessment – failing to monitor the assessment of rateable values of market stalls – substantiated
HD – supervision of market licensee – failing to monitor a market licensee's submission of requisition forms to RVD – substantiated other than alleged

The Complaint

The complainants had rented certain market stalls from HD's market licensee in a public housing estate and had been paying rates through the licensee for some years. They discovered lately that the rateable values of their stalls had never been assessed by RVD and, therefore, suspected that the licensee had appropriated the rates.

2. The complainants complained to this Office against:

(a) RVD for failing to check the requisition forms submitted by the licensee to provide the necessary details for assessment of rateable values; and

(b) HD for failing to monitor the licensee's submission of the requisition forms.

Rates Assessment and Payment

3. Under its agreement with the licensee, HD each month collected from the licensee the rates for the whole market and then paid RVD. Before RVD finished assessing all the rateable values, HD would charge the licensee 5% of the rents as "provisional rates" for all market stalls, including those vacant. After RVD's assessment of the rateable values, HD would calculate the difference between the actual rates payable and the "provisional rates" and settle it with the licensee. The tenants of all stalls had already paid their shares of the "provisional rates" to the licensee.

4. When RVD first assessed the rateable values of the market several years ago, vacant stalls were excluded. Later, some of the vacant stalls were rented out, but RVD still failed to assess their rateable values. Thus, the rates paid by HD for the market did not cover those stalls.

5. On receiving this complaint, RVD immediately arranged rates assessment. However, the Department was time-barred from collecting some $400,000 of the outstanding rates.

RVD's Explanation and Remedies

6. After completing its initial assessment of the market stalls, RVD had kept a record of the vacant stalls for subsequent revaluation. However, the filing staff subsequently failed to bring up the case for

revaluation. Furthermore, RVD failed to detect from the requisition forms annually submitted by the licensee that assessment of rateable values had not been conducted for some stalls.

7. RVD has learned a lesson and has checked with the records of HD and the licensee to ensure assessment of all stalls. It has also set up a centralised file management system to strengthen internal monitoring and issued guidelines to staff on timely assessment of market stalls in new public housing estates.

Our Comments

8. For its negligence, the complaint against RVD was substantiated.

9. Meanwhile, the licensee had not appropriated any of the rates paid by the complainants. In fact, after RVD's assessment, any rates paid in excess had been refunded to them.

10. We found the allegation against HD unfounded because the licensee had been submitting requisition forms directly to RVD. HD was not in a position to monitor the licensee's submission of the forms. Nevertheless, HD could have checked the relevant information attached to RVD's quarterly demand notes for rates.

11. The complaint against HD was, therefore, substantiated other than alleged.

Recommendation

12. The Ombudsman recommended that HD issue guidelines to require staff to keep in view RVD's assessment of rateable values for new market stalls.

A case of negligence

Social Welfare Department ("SWD")

Case No. OMB 2007/2665
Disability Allowance – (a) improperly closing a Disability Allowance case without home visit at all; and (b) unreasonably refusing retrospective payment of Disability Allowance – partially substantiated

The Complaint

The complainant's mother ("Ms A") had been certified severely disabled by a doctor and hence granted Disability Allowance ("DA") by SWD. When her case was due for review after a year, SWD lost contact with

her and so could not confirm her continued eligibility. Her DA payment was thus stopped. Subsequently, Ms A passed away.

2. The complainant was dissatisfied that SWD had:

(a) rashly closed Ms A's DA case without first conducting a home visit; and

(b) unreasonably refused retrospective payment of DA after Ms A's death.

The Event

3. In January 2005, based on the doctor's medical assessment report, SWD granted DA to Ms A for 12 months.

4. Towards the end of that year, SWD staff tried to contact Ms A for case review, by calling her telephone number in the Department's computer records. However, that number was invalid. SWD staff then followed departmental guidelines and sent her three notification letters, the last one by registered mail. Since those letters had neither been responded to nor returned for non-delivery, SWD decided to stop issuing DA to Ms A.

5. In February 2007, the complainant informed SWD that Ms A had passed away in January and requested retrospective payment of DA, to which she considered Ms A to be entitled for the period January 2006 to January 2007. SWD rejected her request.

Our Comments

Complaint Point (a)

6. We found that the staff concerned had complied with SWD guidelines. It was only after three notification letters had been issued to Ms A without any response that her DA case was closed.

7. Nevertheless, on re-examining Ms A's case file, SWD discovered that the contact telephone number in her medical assessment report was different from that in the Department's computer records. Moreover, the report also showed her son's mobile telephone number. Had the staff concerned noticed and tried those numbers, they might have been able to contact Ms A.

8. As to whether a home visit should have been made, from the angle that home visit was not an essential step in DA review procedures, we would not consider it maladministration on SWD's part not to have conducted a home visit in this case. That said, SWD should certainly have been more sensitive to cases like this one, the client being over 80 and seriously ill, hence possibly having difficulties in reading or responding to SWD's letters. In such circumstances, a home visit should have been in order.

9. In sum, there was clearly negligence on SWD's part. The Ombudsman, therefore, considered complaint point (a) partially substantiated.

Complaint Point (b)

10. According to SWD policy, to be eligible for DA, one has to be certified severely disabled by a doctor of a public hospital or clinic. As Ms A had not undergone medical review and there was no medical assessment report to certify her severe disability during her final year, SWD could not agree to retrospective payment of DA as requested.

11. This Office found SWD bureaucratic. It had missed the very intent of the DA scheme, i.e. to help those severely disabled. Due to the special circumstances mentioned above, medical review could not have taken place and hence no medical assessment report could have been produced. Nevertheless, according to Ms A's earlier medical assessment report and her final medical records, her dementia had never shown any improvement and she also had a heart problem, thus requiring constant care. It should take only common sense to recognise Ms A as being still "severely disabled" and eligible for DA in her final year.

12. While SWD had followed its policy and guidelines, it showed a lack of flexibility and compassion. The Ombudsman, therefore, considered complaint point (b) partially substantiated.

13. As SWD insisted on its requirement of a medical assessment report, we sought the Hospital Authority's assistance to produce one based on Ms A's previous report and final medical records. In the event, such a report was sent to SWD, which then made the retrospective payment of DA accordingly.

Recommendations

14. The Ombudsman recommended that SWD remind staff to be more careful in referring to file records and to be more proactive and caring when serving the elderly and feeble.

A case of negligence and lack of flexibility

Transport Department ("TD")

Case No. OMB 2007/4056

Management of public transport interchange – shirking responsibility when handling a complaint about illegal parking of bicycles at a public transport interchange – substantiated

The Complaint

The property management agent ("PMA") of a residential complex had complained to various Government departments about illegal parking of bicycles at the public transport interchange ("PTI") underneath the complex.

2. The problem had persisted for one and a half years. The PMA thus complained to this Office against the departments for shirking responsibility.

Management Responsibility

3. We found TD primarily responsible.

4. The PTI was built by the developer of the residential complex and then handed over to the Financial Secretary Incorporated as required by the land lease. Later, TD took over the PTI as the user department.

5. Section 344 of the Accommodation Regulations provides that the user department, after taking over such a property, shall manage it and monitor its operation and utilisation. TD should, therefore, be responsible for managing the PTI in question.

6. However, TD argued that the management of the PTI should be the "shared responsibility" of all those departments listed in a Maintenance Schedule ("the Schedule") drawn up by the Highways Department, setting out the duties of various departments in maintenance and repairs of the PTI. The Schedule did not spell out which department should handle illegal parking of bicycles. Furthermore, there was no legislation empowering TD to remove such bicycles or issue clearance notices to their owners.

7. As a result, TD kept referring the complaint to other departments for action.

Our Comments

8. It was ridiculous that TD, the user department and thus manager of the PTI, had been trying to pass to other departments listed in the Schedule the responsibility for coping with the problem of illegal parking of bicycles at the PTI. Clearly, the Schedule relates to quite a different subject – maintenance and repairs.

9. While assistance from other departments might be necessary, the overall responsibility rested with TD.

Conclusion and Recommendations

10. The Ombudsman, therefore, considered this complaint substantiated.

11. In this light, The Ombudsman recommended that TD:

(a) conduct a comprehensive review on its management responsibility as the user department of PTIs; and

(b) draw up guidelines on the day-to-day management of PTIs for staff.

A case of shirking of responsibility

Transport Department ("TD")

Case No. OMB 2007/6091

Roadside railing – installing railing along the pavement outside a vehicle repairs shop, thus affecting its viability – substantiated other than alleged

The Complaint

In November 2007, the complainant opened a vehicle repairs shop on the ground floor of an industrial building. In December, he saw TD installing railing along the pavement outside the shop without prior notice. Vehicles could not then enter the shop and business would suffer. He complained but TD only agreed to suspend installation and refused to undertake never to install any railing. The complainant considered his complaint not properly handled.

Public Consultation Conducted

2. The need to install the railing had arisen from a complaint received by the Lands Department ("Lands D") in April 2007 about vehicles frequently going in and out of an adjacent shop in the same industrial building, causing inconvenience and danger to pedestrians. As this contravened the land lease of the entire building, Lands D requested TD to consider installing the railing. TD asked the Home Affairs Department ("HAD") to conduct public consultation. As no objection was received from the public, except from the management company of the building itself, TD requested the Highways Department in July 2007 to proceed with installation.

3. We considered TD to have made a right decision to install the railing for pedestrian safety and the land lease restriction. TD had also duly asked HAD to conduct public consultation. As the complainant's shop was not yet in existence during the consultation, it was naturally impossible to give the complainant "prior notice" then.

Complainant's Request Unreasonable

4. We also considered it appropriate for TD to decline the complainant's request for an undertaking never to install the railing. Before renting the shop space for a vehicle repairs shop, the complainant should have examined the land lease of the building and realised its disallowance of vehicular access via the pavement in front of the shop.

5. This complaint was, therefore, in itself not substantiated.

Other Observations

6. Nevertheless, we noted that the complainant afterwards applied to Lands D for a waiver of the land lease restriction. As TD did not support it, Lands D turned down the application.

7. We found it puzzling that TD should:

(a) initially decide to install the railing for pedestrian safety and the land lease restriction;

(b) then for no good reason, agree to suspend the works; and

(c) finally refuse to support the complainant's application for waiver of the land lease condition.

8. That was a series of self-contradictory acts. Furthermore, by suspending the installation of the railing, TD was in fact condoning non-compliance of the land lease condition by the complainant, although on paper it did not support waiver of the condition. This hindered lease enforcement action by Lands D and gave the public an impression that Government departments lack cooperation.

Conclusion and Recommendation

9. Hence, overall, The Ombudsman considered this complaint substantiated other than alleged.

10. The Ombudsman recommended that TD review the case and work in unison with Lands D on the issues of the land lease restriction and the need for the railing.

A case of contradictory stance and lack of inter-departmental cooperation

ANNEX 14

SUMMARIES OF SELECTED CASES CONCLUDED BY FULL INVESTIGATION

Water Supplies Department ("WSD")

Case No. OMB 2007/4684

Complaint handling – failing to follow up a complaint thoroughly, so that nuisance calls continued – substantiated

The Complaint

In September 2005, the complainant started using a telephone number but soon received numerous calls regarding plumbers' licences. She complained repeatedly to WSD and demanded action. WSD failed to handle it properly and she continued to receive nuisance calls over two years.

Reasons for Persistent Nuisance

2. The number was formerly that of the WSD Licensed Plumbers Registry. Its use had officially ceased on 1 April 2005. Despite the complaint, some WSD staff still referred to outdated information when answering public enquiries on plumbers' licences and wrongly gave that number for further enquiries. Moreover, the WSD website continued to list that number as one of its contacts.

3. Meanwhile, a WSD staff member who taught part-time at an Vocational Training Council institute thought the number to be still valid for WSD enquiries and released it to his students.

Insufficient Notification

4. WSD indicated that before use of the telephone number ceased, WSD had notified various parties through its external announcement and internal notification arrangements. However, we doubted whether all the parties concerned had been fully informed.

5. In internal communication, although matters concerning plumbers' licences had been taken over by the Customer Telephone Enquiry Centre, some staff members (including those at the Enquiry Centre) were found repeatedly advising enquirers to call that number. It was evident that some Enquiry Centre staff were not aware of their duty to answer such enquiries.

6. As regards external communication, WSD explained that since the number was not for use by other departments, they were not notified individually when its use ceased. We considered this argument clearly unsound as District Offices often had to answer different public enquiries, including those on WSD services.

Serious Delay in Complaint Handling

7. WSD had simply failed to examine thoroughly the crux of the problem when it followed up the complaint. It merely left it to individual staff members to handle the problem on their own and make different decisions each time the complainant raised a new issue. As the handling procedures lacked coordination, thorough discussion and examination, only a partial solution could be offered each time a complaint was received. Worse still, some staff members continued to give the public the disused telephone number.

8. Against this background, The Ombudsman considered the complaint substantiated.

Our Recommendations

9. WSD accepted our recommendations to:

(a) review its complaint handling mechanism and procedures and consider requiring case officers to refer complaints that had been lodged repeatedly or remained unresolved for some time to their supervisors for coordinated handling;

(b) remind staff members seeking to take up outside work in relation to water facilities or WSD operations that they should check whether any information to be released about the Department might be outdated;

(c) review the Department's internal notification mechanism, especially where the matter to be notified involves new correspondence addresses and telephone numbers and may be released to the public; and

(d) remind staff at all levels of the need to raise their service attitude and sensitivity in all areas and to endeavour to provide a client-centered service.

A case of delay and lack of internal communication